



BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario Human Rights Code, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Giovannina Ruberto Martinie, alleging discrimination with respect to services, goods and facilities on the basis of sex by Italian Society of Port Arthur. The original complaint was filed with the Human Rights Commission on April 14, 1989, and subsequently referred to the Board of Inquiry on August 24, 1993.

B E T W E E N :

Giovannina Ruberto Martinie

Complainant

- and -

Italian Society of Port Arthur and Salvatore (Sam) Federico

Respondent

DECISION

Adjudicator : Loretta Mikus

Date : June 14, 1995

Board File No: 93-0027

Decision No : 95-023

IN THE MATTER OF A COMPLAINT DATED APRIL 14, 1989 BY
GIOVANNINA MARTINIE ALLEGING DISCRIMINATION
CONTRARY TO SECTIONS 1 & 8 OF THE ONTARIO HUMAN
RIGHTS CODE R.S.O. 1990 CH. H-19 BY THE ITALIAN SOCIETY
OF PORT ARTHUR

BEFORE: Loretta Mikus, Chair, Board of Inquiry

APPEARANCES: Mr. Tony Griffin, Counsel for the Commission
Ms. Martinie, Complainant .

Mr. Michael Mauro, Counsel for the Respondents
Mr. Sam Frederico

By complaint dated, April 14, 1989, Ms. Giovannina Ruberto Martinie lodged a complaint against The Italian Mutual Benefit Society and/or The Italian Society of Port Arthur and Mr. Salvatore (Sam) Federico alleging that her right to equal treatment with respect to services, goods and facilities had been infringed because of her sex in contravention of Sections 1 and 8 of the **Human Right's Code R.S.O. 1990, Ch. H.19.**

At the commencement of the hearing, Commission counsel asked to amend the complaint by deleting the references to The Italian Mutual Benefit Society and Mr. Salvatore Federico, as Respondents. The Respondent, therefore, is The Italian Society of Port Arthur (Hereinafter referred to as the "Society"). Commission counsel also advised me that the Complainant was seeking no general damages, but was seeking a declaration that her rights were infringed and an order that her application for membership be accepted by the respondent Society.

There was no dispute on the facts. Mr. Federico has been a member of The Italian Society for twenty-seven years and its president since 1988. The first executive of the Society was elected at a general meeting in January of 1930. Subsequently, a constitution was adopted which set out, as its objectives, the following:

- A. The objects of this Society shall be to unite all male persons of Italian descent in and around the community of Thunder Bay.
- B. To promote their social, cultural and economic interest and to urge the exercise of their responsibilities as citizens.
- C. To safeguard, protect and extend freedom, civil liberties and democracy.
- D. To undertake and transact any class of insurance for which a mutual benefit society may be licensed under the provisions of the **Insurance Act** and to do all such other things as are incidental or conducive to the attainment of the above objects.

- E. The Society will not interfere or take part in any private or personal matter which does not pertain to Society affairs and does not take place inside the Society premises.
- F. The Society may acquire or hold absolutely for its own use and benefit such real estate and other chattels as is necessary for the transaction of its business or for the carrying out of its objects.

Its membership was limited to the following:

- B. Regular members shall be male persons of Italian birth or descent, between the age of 18 and 55, in good health and of good morale character.
- C. Associate members shall be male persons of Italian birth or descent who are over the age of 55 years, or are unable to pass the required medical examination, or are non Italian but are married to an Italian girl.
- D. The Society may elect up to ten (10) honorary members not necessarily of Italian birth or descent when considering persons for honorary membership. Criteria shall be, if of Italian birth or descent, he shall be in good standing as a member of society and shall have contributed long and meritorious service to this Society and the Italian community. If of non-Italian birth or descent, he shall be of good morale character and have contributed meritorious and outstanding service to the Italian community.
- E. Any person wishing to become a member of the Society, must submit an application form provided the Society along with the medical certificate of good health and a necessary initiation fee. New applications shall be referred to the Executive Board for approval subject to final approval by the membership.

According to Mr. Federico, over the years the Society no longer fulfilled its mandate as a mutual benefit society. It evolved into a fraternal organization and, in 1988, it changed its letters patent to legally reflect that change. He explained that, in 1988, the name of the Society was changed from The Italian Mutual Benefit Society to The Italian Society of Port Arthur and the objects of the Society were amended by the deletion of the reference to insurance (paragraph D above) and the inclusion of the following:

- A. To unite male persons of Italian descent in and around the City of Thunder Bay for the preservation and strengthening of a fraternal spirit among those of Italian descent.
- B. To stimulate and interest and involvement in community affairs and to promote the Italian culture and heritage.
- C. To promote social intercourse between the members and their guests.

Mr. Federico described the Society as a group of males, directly or indirectly of Italian descent, or related by marriage to a person of Italian descent. He explained that, when a man marries into the Italian community, the Society is as interested as having him form a strong bond within that community and becoming part of their brotherhood as it is in fostering bonds with those of Italian origin. The membership to non-Italians who have married into an Italian family was initiated in 1958. These men are classified as associate members, do not have voting privileges and cannot run for elected office.

The Society owns a building in Thunder Bay that contains a hall and club room. The Society uses those premises for meetings and as a social club. The members engage in card games, social drinking, bocce ball, a form of lawn bowling, and other activities of interest. The executive members respond to the interest of its members by sending flowers when appropriate, visiting the ill and acting as an honorary guard for funerals. As well, the Society raises funds through the bar on its premises, operates a banquet service for weddings and other celebrations, rents out its meetings rooms and provides a daily lunch service. All of the funds raised are used for the Society in furtherance of its objects, according to Mr. Frederico. Its members host a monthly spaghetti dinner from September to June and have an annual banquet. As well, the Society is involved in an annual picnic for the Italian community involving between 100 - 200 families of several generations.

Mr. Federico testified that the Society has always operated as a fraternal organization. It was founded on that basis and remains so to this day. The objects or aims of the association are

fashioned on that premise. Mr. Federico frankly admitted that the Complainant was denied membership in the Society because she failed to meet the criteria; that is, she was not male.

The Complainant testified that she desired to become a member of the Society because she believed it was the one organization involved in getting things done in the Italian community. She was also interested in furthering its involvement with Italian children. She has two daughters and wanted them to become involved as well. For the past ten years she had been teaching Italian heritage language classes to elementary students on Saturdays as well as teaching high school credit courses to students and adults. She has been involved as a volunteer in Italian celebrations. Her interest in joining the Society included an interest in helping children of Italian descent develop pride in their language, regain a lost language and, generally, in making the Society more family oriented. It was her belief that women would bring a different experience to the Society's perspective, thereby enriching it. As stated previously, she was seeking an order that Society open its membership to females.

ARGUMENT

Commission counsel argued that general principles have been applied by other tribunals in interpreting the Code which hold that human right's legislation should take precedent over other legislation and that Boards of Inquiry should interpret human rights legislation liberally and purposively. By corollary, exceptions to the prohibition against discrimination should be narrowly construed. The onus is on the Respondent to prove, on the balance of probability, that

it comes within the criteria of section 18. The Commission took the position that, if there is any doubt that the Respondent has met its onus, the benefit of that doubt should favour the Complainant. If the Respondent fails to prove that it meets every criteria of the narrowly construed section 18, it must be found to have failed to meet its onus. Section 18 reads as follows:

18. Special interest organizations.- The rights under Part 1 to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.

It was the Commission's position that there are three criteria in section 18 that the Respondent must meet in order to succeed. It must prove first that the Society is a fraternal or social institution. Mr. Griffin accepted the Respondent's position in this regard. Secondly, it must prove that it is primarily engaged in serving the interests of the persons identified by the prohibited ground, and, thirdly, that its membership is restricted to persons similarly identified.

With respect to the second criteria, Mr. Griffin asserted that the Society is engaged in serving the interests of the people of the Italian community in the Thunder Bay area. While they appear to have a restricted membership policy, they hold picnics, banquets, Christmas parties and other activities that benefit the Italian community at large. He cautioned the Board against adopting a "boot strap" argument, that is, the Society serves the interest of men because it restricts its membership to men. If that were a valid argument, section 18 would read differently. It would not have included the reference to "being engaged in serving the interests of the persons identified by a prohibited ground of discrimination". Commission counsel that the section

requires more. The Society must be engaged in activities solely related to its restricted membership. For the Society to assert that it benefits men because it excludes women is to perpetuate the argument advanced by an historically advantaged group, that is men, to exclude an historically disadvantaged group, that is women.

The Commission argued that the Respondent has failed to meet the third criteria as well. Its constitution states that the Society is to unite male members of Italian descent. In fact, membership is not restricted to males of Italian descent. It is open to any non-Italian male who has married into an Italian family. That is not consistent with the Respondent's primary goals. The Society calls them associate members with limited rights. That, however, does not alter the fact that they are accepted as members. Since membership is not restricted to men of Italian descent, the Respondents have failed to meet the third criteria of section 18.

Commission counsel urged the Board to find that the refusal to accept the Complainant's application was discriminatory and asked for an order permitting women to become members of the Italian Society of Port Arthur if they otherwise meet the criteria.

The Commission relied on the following cases: **Zurich Insurance Company v. Ontario Human Right's Commission**, 16 C.H.R.R. d/255 (SCC); **Margaret Caldwell v. St. Thomas Aquinas High School**, 6 C.H.R.R. d/2643 (SCC); **Tomen and Smith v. Ontario Teachers Federation and Ontario Public Schools Teachers Federation** (unreported) Dr. J.D. Baum and **Gregory v. Donauschwaben Park Waldheim Inc.** 13 C.H.R.R. d/505 (Ontario Board of Inquiry).

Counsel for the Respondent agreed that there was no dispute on the facts. The Italian Society of Port Arthur did deny membership to the Complainant because of her gender. He took the position that section 18 was designed to allow certain types of organizations an exception to the prohibition of discrimination if they meet the criteria. In this case, if the Society does meet those criteria, this Board must dismiss the complaint.

The Respondent took the position that the inescapable conclusion must be that the Society meets the criteria of section 18. It is a fraternal organization whose primary activity is to serve the interest of males of Italian decent. That does not mean that it must only serve the interest of that one group, but that it primarily do so. The Society responds to membership interests and the inclusion of social events to persons outside of its membership are secondary. As additional activities, the Society operates a club house and raises revenue in order to maintain its facilities. Those, however, are secondary interests of the Society. The primary purpose, at all times, is to create a fraternal bond amongst Italian males.

The Society has never purported to act in the interest of the Italian community at large. The identified group is males of Italian descent and men married to women of Italian decent. That is their common interest and their common goal. Section 18, argued Respondent's counsel, is designed to protect precisely this type of organization. If the Commission's interpretation were accepted, section 18 would be rendered meaningless in that organizations like the Italian Society of Port Arthur could no longer exist in their present form. The government clearly meant for an organization like the Society to be protected.

In support of his argument, Respondent's counsel relied on the following cases: **Gould v. Yukon Order of Pioneers** 14 C.H.R.R. d/176 (Supreme Court of the Yukon Territory) **Caldwell (supra)**; **Sedhev v. Bayview Glen Junior Schools Ltd.** 9 C.H.R.R. d/4881 (Ontario Board of Inquiry) (*supra*).

In their arguments, counsel referred the Board to previous decisions of Human Rights tribunals in support of their respective positions. Although none of these cases are directly on point with the facts of the instant matter, they are, nevertheless of some assistance with respect to general principles and approaches in interpreting human rights legislation.

In the **Caldwell** case (*supra*), the Supreme Court of Canada ruled that Ms. Caldwell was not discriminated against because of her religious or marital status when her employment as a teacher with the St. Thomas Aquinas High School was terminated because she married a divorced man in a civil ceremony. One of the grounds of appeal concerned section 8 of the **Human Rights Code**, R.S.B.C 1979, c. 186 which prohibited discrimination in employment on several grounds and included a "**bona fide qualifications**" criteria. The Court found that the requirement for the acceptance and observance of the church's rules regarding marriage was reasonably necessary to assure the achievement of the objects of the school. In its view, that constituted a **bona fide** qualification in respect of the employment of a catholic teacher employed in a catholic school. The absence of that observance deprived her of the protection of section 8 of the **Human Rights Code**.

A further basis for the appeal was the argument that section 22 of the **Code** created an exception to the general prohibition against discrimination in employment. The argument was advanced it should be narrowly construed so as not to permit any greater limitation than is necessary on the very rights the **Code** was enacted to create and protect. Section 22 is similar to section 18 of the **Ontario Code** and reads as follows:

22. Where a charitable, philanthropic, educational, fraternal, religious or social organization or a corporation that is not operated for profit as a primary purpose. The promotion of the interests and welfare of an identifiable group or class of persons characterised by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or group shall not be considered as contravening this Act because it is granting a preference to members of the identifiable group or class of persons.

The Court said, in paragraph 21,826, in part:

To begin with, it must be recognized that we are here facing a situation where there is a clear conflict between two sound legal positions. There is an assertion by each party of a clear legal right and the two rights, if each is to be accepted with no modification or limitation, are incompatible...

It went on in, paragraph 21827, to state:

It seems evident to me that the Legislature of British Columbia, recognizing that historically acquired position of the denominational school and the desirability of preserving it, in enacting a **Human Right's Code** which goes far to eliminate differences and distinctions in society, included s.22 as a protection for the denominational school or other institutions in like case. It is, therefore, my opinion that the Court should not in construing s.22 consider it merely as a limiting section deserving of a narrow construction. This section, while indeed imposing a limitation on rights in cases where it applies, also confers and protects rights...

The Court found that the school authorities were exercising a preference for the benefit of the members of the community served by the school and forming the identifiable group by preserving a teaching staff whose catholic members all accepted and practised the doctrines of the church.

Commission counsel argued that the result in the **Caldwell** case (*supra*), would have been

different had it been decided under the **Ontario Human Rights Code**. Section 19 of that **Code** specifically preserves the rights of separate school boards and section 24 (1) specifically allows organizations identified in section 22 of the **B.C. Human Rights Code** to give preference in employment if the qualification is a reasonable because of the nature of the employment. The Commission asserted that the decision in **Caldwell** resulted because it was the only way the Courts could allow for the continued separation of separate and public schools. Had the court had the benefit of sections 19 and 24(1) of the Ontario **Code**, it would have been able to give a more restrictive interpretation to section 19. It took the position that Section 18 is distinct from sections 19 and 24(1). It does not deal with education or employment rights. Rather, it is concerned simply with the right of an organization to restrict its membership on a prohibited ground.

Respondent's counsel referred to the **Sehdev** case (*supra*). In that case, a Board of Inquiry found that the Bayview Glen Junior School had discriminated against the respondent by refusing him admission to the school because he was a member of the Sikh faith and wore a turban. The school operated a private school with a strict uniform policy requiring children to wear a school uniform, prohibiting long hair and the wearing of a turban. The child's mother was discouraged from making an application on his behalf because of this uniform policy, from which she was told "no exceptions were allowed". The Board of Inquiry found that, as a private school, it could restrict its admission to persons who were members of certain religions, but that, in the absence of such an express restriction, it could not maintain a uniform policy which had the effect of excluding children of certain faiths. In considering the effect of section 17 (now 18)

on the facts of that situation, the Board of Inquiry concurred with the decision in **Caldwell** and agreed section 17 provided an exemption to the general prohibitions on discrimination. It found, however, on the facts of that case, that the Bayview Glen Junior School did not meet the criteria of section 17.

Commission counsel relied on the **Zurich** case (*supra*) for the proposition that exceptions to the prohibition against discrimination should be narrowly construed. That case involved a decision by the Supreme Court of Canada that the Zurich Insurance Company did not discriminate against the Complainant by charging him higher premiums for automobile insurance because of his age, sex and marital status.

The **Gregory** case, (*supra*), concerned an allegation that the Complainant had been discriminated against, in part, with respect to his right to accommodation based on ancestry, place of origin and ethnic origin. The Complainant was interested in purchasing a residential property which he understood to be listed for sale. The real estate listing stated that the property could only be sold to a person who was German speaking and that the purchaser would have to be approved by the Donauschwaben Park Committee. Nevertheless, Mr. Gregory made a formal offer for the full listed price and was refused. He filed a complaint with the Ontario Human Rights Commission alleging discrimination on the basis of ancestry, place of origin and ethnic origin.

The Donauschwaben Park Waldheim Inc. was a non-profit society whose objects were to foster

and preserve the culture and heritage of the Danube Swabians, a group of German extraction whose ancestors were among the pioneer settlers in the basin of the Danube River in South Eastern Europe. The membership by-laws of the park stipulated that only persons of German origin over the age of sixteen could be regular members.

The Donauschwaben Park consisted of a parcel of land which was owned in common by the members. On the land were a large central lodge and dining facility, swimming and playing areas. Approximately 40 acres of the parcel were divided into building lots which were made available to members of the park for use as sites for cottages, tents, trailers or winterized homes. The respondent made a bid on one of the building lots in the park. According to the practices of the park, the use of the lot and the building which stood on it could be transferred to a new owner only if (s)he met the criteria for membership.

In considering the application of Section 17 to the facts before him, Professor McCamus said the following in, paragraph 24:

...In my view, however, the proper interpretation of Section 17 and its applicability to the present facts are questions of some difficulty. The principle source of these difficulties, no doubt, is that the underlying philosophy of Section 17 appears to run counter to the underlying egalitarian philosophy of the anti-discrimination measures adopted in the Code. If the Code generally promotes a social and economic climate in which decisions, based on discriminatory criteria are absent, Section 17 permits the creation of islands of exclusivity for certain purposes within a broader sea of social and economic equality. It seems obvious, therefore, that Section 17 should not be given so expansive a reading that it underlines the egalitarian objectives of the Code, but it is not obvious what the outer boundaries or limiting considerations, in an interpretation of S.17 ought to be...

Section 17 requires that a line be drawn between the kinds of services and facilities that can be provided on a discriminatory basis to the membership of certain religious and other types of groups on the one hand, and the kinds of services and facilities that must be provided only in the egalitarian market place envisioned by the Code. In short, in attempting to apply Section 17 to particular cases, it may be asked whether the organization in question is of the kind envisioned by Section 17 and whether the services and facilities are of a kind so envisioned.

In that case, Professor McCamus noted that counsel for the Commission did not comment on the fact that the community ostensibly served by the organization's activities was the Danube Swabian Community, whereas the membership condition related to a broader Germanic ethnic connection or linguistic ability. He presumed that the Commission's position on the point was that it was not inconsistent with the stated objectives of the organization to permit other German-speaking individuals to participate in the activities of the organization.

He went on in, paragraph 32 to state:

...Thus, the ability of DS Park to rely on S.17 is very much dependent on the nature of the association's cultural mission, the services and facilities provided to the membership and the fact that the DS Park itself is used as an environment for the attainment of its cultural and social objectives...

Professor McCamus concluded with the following. in paragraph 34:

...On the foregoing basis, then, I am satisfied that all of the elements of the S.17 test are met and that the activities of the DS Park Inc and, more particularly, its policies on membership do not constitute a contravention of The Code to the extent that it fails to provide "equal treatment with respect to services and facilities". It does so in a manner which is rendered acceptable by Section 17 of The Code.

In the **Gould** case (*supra*), the Complainant alleged discrimination under the **Yukon Human Rights Act**, S.Y. 1987 c. 3 with respect to services offered or provided to the public. The Complainant was refused membership in the **Yukon Order of Pioneers** (hereinafter referred to as the "**Order**") because of her sex. The **Order** was a one hundred year old male association that organized social activities for its members and participated in local parades and events. It also collected historical data respecting the Order which its members provided to the Yukon Archives and to public requests for historical information. The complaint alleged that the male only character of the order had the effect of discriminating against women as a group because the history of women's contribution to the development of the Yukon was omitted from the

Order's records.

The Order was founded in 1894 by the leading citizens of a predominantly male community. It was proposed that the organization be a moral and fraternal order for the purpose of establishing a police force whose primary concern would be the security and well being of its members. Membership was restricted to male persons of integrity and good character who met a ten year residency requirement. In the early 1900's, due in large part to the arrival of the Northwest Mounted Police, the policing activities of the Order were no longer required and those activities ceased. From then to the date of the hearing, the primary objects of the Order had been social, historical and cultural with its paramount concern being the welfare and well being of its members.

During that time the activities of the Order consisted of ten monthly membership meetings per year. Membership in the Lodge included two social functions per year for members and guests, one annual Lodge meeting followed by a social function, participation in the Discovery Day parade and the rendezvous parade, committee work attending to the welfare and well being of the members. The primary objects and focus of the Order were the mutual protection of its members and the uniting of those members in a strong tie of brotherhood. The Order was dedicated to maintaining the history of the Order and its members, safeguarding the moral values, male camaraderie and mutual respect and traditions of the members, the advancement of the Yukon Territory, the preservation of the names of all Yukon pioneers on the roles of the Order and collecting and preserving Yukon history.

It was with respect to these final functions of the Order that the complaint arose. It was the position of the Complainant that the Order discriminated in the preparation of processing the historical information concerning the Yukon. The historical information collected and disseminated by the Order pertained only to the contribution of males to the development of the Yukon Territories, thereby leading to an incomplete and distorted view of Canadian history.

The relevant provisions of the Yukon's Human Rights Act were as follows:

Prohibited discrimination

8. No person shall discriminate

- a) when offering or providing services, goods or facilities to the public,
- b) in connection with any aspect of employment or application for employment,
- c) in connection with any aspect of membership in or representation by any trade union, trade association, occupational association or professional association,
- d) in connection with any aspect of the occupancy, possession, lease or sale of property offered to the public,
- e) in a negotiation or performance of any contract that is offered to or which offers are invited from the public.

Exemptions

- 10 1) It is not discrimination for a religious, charitable, educational, social, cultural or athletic organization to give preference to its members or to people the organization exists to serve.
- 2) It is not discrimination for individuals to give preference to members of their family.
- 3) Section 8 does not apply to
 - a) the employment of a person to provide services in a private home or in any exclusively religious, charitable, educational, social, cultural or athletic organization,
 - b) the choice by an occupant of a private home of a boarder.

The Board of Adjudication determined first that there was an element of public service in the

activities of the Order and, as such, section 8(a) of the Act applied. It further found that the Order's failure to allow women to be part of the collection of historical data was discrimination of a type prohibited by section 8(a) of the Act and that section 10 of the Act respecting group exemptions did not apply. It concluded that the criteria limiting membership to male pioneers was overly restrictive.

The Order appealed that decision on several grounds. The Supreme Court of the Yukon Territory began its deliberations by considering the appropriate approach to interpreting human rights legislation. It stated, in paragraph 54, the following:

In my view, the first question the Board was required to answer was as follows:

Did the exclusion of Madeline Gould from membership in the Pioneer's by reason of the fact that she is female, constitute discrimination within the meaning of the Act? It is only if the conduct complained of fits within Section 6 or Section 11 of the Act when read together with Section 8 of the Act that the two situations relating to an organization's membership policy, as referred to by the Board in its decision, would have any relevance and then only if the conduct does not otherwise fit into one of the defences or exemptions provided by the Act. It seems logical, therefore, to initially determine the membership policy issue separately from the issue of collection and preservation of "history" and proceed from that point to considering the relationship between them. I propose to deal with the membership policy issue first...

Simply put, the conduct complained of must first be "discrimination" as defined by Section 6 or 11 of the Act. This will be the first step in any determination as to whether there was prohibited discrimination under the Act...

It is quite clear that it is the discriminatory result or effect, not a discriminatory intent which is significant to require a Complainant to establish discriminatory intent would be to defeat the objectives of the Act since, in most cases, it would be near impossible to prove motive.

It went on to say in, paragraphs 74 and 77, the following:

Whether or not discrimination has been established is a question of law. The Board by stating that discrimination in the abstract had been established failed to take into account relevant considerations respecting the issue of discrimination and erred in law. The Board must view the definitions of discrimination in a broader social political and legal context. The Board must consider the objectives the legislation sought to achieve...

In my view, in determining whether discrimination on an enumerated ground has been established, it is necessary to look not only at the situation as described in Section 8 of the Act wherein discrimination is prescribed, but to interpret Section 8 in its social, political and legal context.

And, in paragraph 124, it stated the following:

...On the ultimate question of whether what the pioneers do, amounts to prohibited discrimination, all activities must be considered together to produce a complete picture of this organization and the conduct of the pioneers which is alleged to be discriminatory.

In considering the issue of exemptions generally, the Court noted, at paragraph 149:

But, in my view, there is a distinction between legislative provisions which limit rights and those that are, in fact, integral to the determination of the scope and ambit of the Human Rights statute and which must be given full effect. This is the fundamental distinction between S.S. 9 and 10 of the Human Right's Act.

That comment was consistent with the conclusion of the Court in the **Caldwell** decision (*supra*) where it stated that similar clauses should not be narrowly construed because, while they limited rights, they conferred and protected rights as well. It determined that exemptions should be interpreted objectively, not based on capricious distinctions but by facts that make the exclusion a rational and logical sequence of the nature of the organization. The effect, according to the Court, was to establish the primacy of the rights of the group over the rights of the individual in specified circumstances. It stated in paragraph 152:

...The group rights exemption in S.10 of the Yukon Human Rights Act is designed to promote the fundamental freedom of individuals to associate in groups for the purpose of expressing particular views or engaging in particular pursuits unrestricted by the anti-discriminatory rules which are the norm, subject to restrictions as to the nature of the organization. While the wording of exemptions sections vary from jurisdiction to jurisdiction, the essence of the protection afforded groups and the reasons for this protection are the same. While the Court conceded that in defense issues under The Code, a narrow or restrictive interpretation might be appropriate, it was not necessarily the appropriate interpretative approach when considering exemptions. It found that the Board of Adjudication in failing to consider the applicability of S.10, erred in law.

Based on its findings, the Court referred the matter back to the Board of Adjudication for reconsideration.

DECISION

In this case the Commission has argued that human rights legislation should be granted quasi-constitutional status. It is, as stated in the **Zurich Insurance** case (*supra*), "the last protection of the most vulnerable members of society" and, as such, exceptions to it should be narrowly construed. Many Boards of Inquiry and Courts have approved and applied those principles.

In the **Gould** case, the Human Rights Act of the Yukon specifically divided exemptions to the general prohibition against discrimination into two categories, reasonable cause and exemptions. In doing so, it distinguished between those instances where discrimination would be reasonable those circumstances where particular groups or organizations were entitled to give preference to other specified groups or individuals. For that reason the decision of the Supreme Court of the Yukon Territory, in my view, correctly identified the two as having a different purpose.

The reasonable cause provisions in section 9 of the Yukon Act do not confer particular rights to an individual but merely allow for circumstances in which particular preferences are deemed to be acceptable. In Section 10, under the heading of **Exemptions**, certain groups or persons were given the right to engage in particular activities that would otherwise be deemed to be contrary to the Act. The Ontario **Human Rights Code** is not so clear. It sets out, in various sections, exemptions or exclusions from the general prohibition of discrimination by reference to the service being considered. It provides for exemptions in accommodation, employment, services and facilities. For each of those exemptions, the **Code** attempts to balance the general right of people to be treated without discrimination while, at the same time, acknowledging that

there are circumstances where it is acceptable for individual preferences and/or needs to take precedent.

Section 18 of the **Code** specifically allows that religious, philanthropic, educational, fraternal or social institutions or organizations that are primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination and restricted to persons who are similarly identified do not infringe the public's right to equal treatment with respect to services and facilities.

No right is absolute. The public's right to be treated without discrimination must be considered against an organization's right to limit its membership to an identified group. The onus is on the party seeking the exemption to prove that it falls squarely within the criteria of the section. If it does, then, in my view, it is entitled to seek the rights in section 18.

Counsel for the parties were in agreement concerning the three criteria the Society must meet before it can claim the benefit of section 18, that is that it is a fraternal or social institution, that it is primarily engaged in serving the interests of its members and that its membership is restricted to the persons identified as members. In this case, there was no dispute that the Society meets the first criteria, that it is a fraternal organization.

Commission counsel, however, took the position that the Society did not meet the second criteria because it was not engaged in serving the interests of its membership but rather the Italian

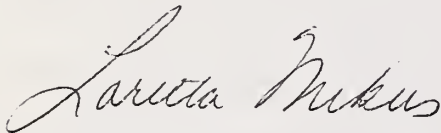
community of Thunder Bay. While there was evidence of community participation in the Society's activities, the majority of the Society's time is spent in attending to the interests and concerns of its members. The requirement under the **Code** is not that the Society engage solely in activities that serve the interests of its members. If the legislature of Ontario had intended that section to be read so restrictively, it would have said so in clear terms. Indeed, the fact that it chose the word "primarily" indicates a contrary intention. The fact that it primarily engages in activities serving the interests of its members persuades me that the Society meets that criteria.

The third criteria is that membership in the organization be restricted to persons similarly identified. The evidence shows that the full membership rights are granted to males of Italian descent and that partial membership rights are granted to males married to women of Italian descent. The Commission took the position that the membership policies of the Society are inconsistent with its stated goals, which are to unite male members of Italian descent. They therefore do not meet the requirements of section 18. I disagree. The **Code** states that membership must be restricted to persons similarly identified. The goals of the organization, in addition to the one stated above, are to promote the social, cultural and economic interests of the members. The decision to include males married to women of Italian descent is in furtherance of that goal. The associate or partial membership is offered to males whose relationship is sufficiently connected to that of the members that they are, in my view, similarly identified.

In summary, the Italian Society of Thunder Bay meets the requirements of section 18 of the Code. It is a fraternal organization that is primarily engaged in serving the interests of an identified group and that restricts its membership to persons similarly identified.

There has been, therefore, no infringement of the Complainant's rights and the complaint is dismissed.

Signed this 14th day of June, 1995

A handwritten signature in cursive script, reading "Loretta Mikus". The signature is written in dark ink and is positioned above the printed name.

Loretta Mikus